KATHIRAVALUPILLAI v. GOVERNMENT OF MALAYSIA

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) June 9, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 118 of 1975]

Administrative Law — Dismissal of public officer — Disciplinary proceedings taken after conviction for criminal breach of trust — No appeal brought against conviction — Application for declaration that dismissal null and void — Time barred — Whether right waived — No reasonable cause of action — Public Authorities Protection Ordinance, 1948, s. 2(a).

The appellant, a public officer, had been convicted in the Sessions Court for criminal breach of trust. Subsequently disciplinary proceedings were taken against him and he was dismissed in 1960. He did not pursue an appeal against his conviction. In 1974 he applied for a declaration that his dismissal from the service was null and void and of no effect. A preliminary objection was taken that the action was time-barred under section 2(a) of the Public Authorities Protection Ordinance 1948. The action was dismissed in the High Court and the appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) in this case the Public Services Commission dismissed the appellant in pursuance or execution of the powers vested in them by the Public Services (Conduct and Discipline) Regulations, 1956 and therefore section 2(a) of the Public Authorities Protection Ordinance, 1948, was applicable and the action was time-barred;

(2) the allegations of fraud raised by the appellant all related to the failure of the prosecution to produce certain evidence at his trial in the Sessions Court. As such they should have been raised at the trial or at the appeal from his conviction which the appellant chose not to pursue;

(3) in this case the appellant had not waived his right to have the action dismissed on the ground that it was time-barred either by asking that the originating motion which was originally taken be dismissed on procedural grounds or by applying for the action to be dismissed before the statement of claim was filed;

(4) although it was not necessary for the learned judge to decide the point in order to dismiss the action, he was right in saying that there could be no reasonable cause of action so long as there remained on the record the appellant's conviction for criminal breach of trust, which was the basis for his dismissal from the service.

Cases referred to:—

(1) *Mak Koon Yam & Anor.* v. *Municipal Councillors, Malacca* [1961] M.L.J. 256.

(2) *Haji Abdul Rahman* v. *Government of Malaysia & Anor.* [1966] 2 M.L.J. 174.

(3) *Wee Hong Heng* v. *Municipal Commissioners of Singapore* [1937] M.L.J. 207.

(4) *Bradford Corporation* v. *Myers* [1916] 1 A.C. 242.

(5) *G. Scammell and Nephew Ltd.* v. *Hurley & Ors.* [1929] 1 K.B. 419.

(6) *Joseph* v. *Government of Sarawak & Anor.* [1975] 2 M.L.J. 39.

(7) *Mooney & Ors.* v. *Peat, Marwick, Mitchell & Co. & Anor.* [1967] 1 M.L.J. 87.

FEDERAL COURT.

Sri Ram for the appellant.

Zaleha binte Zahari (Federal Counsel) for the respondent.

Gill C.J. (Malaya) (delivering the judgment of the Court): This was an appeal by the plaintiff from the dismissal by Mohamed Azmi J. of his action in which his claim against the respondent as defendant was for a declaration that his dismissal from service was null and void and of no effect, for an order that the defendant do reinstate him in service and for damages.

The plaintiff was an employee of the defendant as an officer in the Postal Services Department from March 28, 1938 until November 8, 1960 when he was dismissed from service on disciplinary proceedings being taken against him in accordance with regulation 40 of the Public Officers' (Conduct and Discipline) Regulations, 1956 (General Orders, Cap. D), following his conviction by the Sessions Court at Kuala Lumpur on a charge of criminal breach of trust under section 409 of the Penal Code for which he was sentenced to one day's imprisonment in default of payment of the fine.

The plaintiff appealed against his conviction but later withdrew his appeal. He applied for revision on two or three occasions without any result. On October 5, 1973 he took out an Originating Motion in the High Court at Kuala Lumpur asking for an order that his dismissal be declared null and void and of no effect. On the defendant objecting to the procedure adopted by the plaintiff, no order was made on the originating motion and presumably some sort of order was made requiring the plaintiff to file a proper action. The action from which this appeal was brought was commenced by a writ taken out on May 29, 1974.

Before the plaintiff filed his statement of claim the defendant took out a summons in chambers for an order that the action be set aside on the ground that it was time-barred. Later, the defendant withdrew the summons and requested the plaintiff to file his statement of claim. The plaintiff duly filed his statement of claim, a rather lengthy document more in the nature of a statement leading up to his dismissal and his alleged discovery subsequently that his conviction had been obtained by fraud. The defendant filed its statement of defence in which it averred, inter alia, that the statement of claim disclosed no reasonable cause of action and was frivolous or vexatious and an abuse of the process of court. In the further alternative it was averred that the action, not having been commenced within 12 months from the alleged act of dismissal, was time-barred by virtue of section 2(a) of the Public Authorities Protection Ordinance, 1948 which provides as follows:—

> "Where, after the coming into force of this Ordinance, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —
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> the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within twelve months next after the ceasing thereof."

This further defence in the alternative was raised as a preliminary objection at the commencement of the trial of the action. Section 2(a) of the Ordinance was amended by Act A. 252 of 1974 which enlarged the period of limitation from twelve months to thirty six months. Both parties agreed that it was the old period of limitation which applied to the case so that the plaintiff ought to have filed his writ within twelve months from September 12, 1961 when he was notified of his dismissal with effect from November 8, 1960. Nothing, however, turned on that agreement because

the action was commenced more than twelve years after the act complained of.

In support of his preliminary objection counsel for the defendant relied on the two cases of *Mak Koon Yoon & Anor.* v. *Municipal Councillors Malacca*[1] and *Hj. Abdul Rahman* v. *Government of Malaysia & Anor.*[2] The plaintiff, who was not represented by counsel, cited the cases of *Wee Hong Heng* v. *Municipal Commissioners of Singapore*,[3] *Bradford Corporation* v. *Myers*[4] and *G. Scammell and Nephew Ltd.* v. *Hurley & Ors.*[5] as authorities for the proposition that section 2(a) of the Ordinance did not apply to the present case. The learned judge took the view that as those authorities merely say that the period of limitation under section 2(a) of the Ordinance does not apply to any act or omission not arising out of statutory duty they were not relevant to the present case. He went on to point out that in the present case the plaintiff was dismissed under the General Orders so that the act of dismissal by the Public Services Commission was in pursuance of a written law or, alternatively, of a public duty. In the circumstances he made a finding that section 2(a) did apply to the case so that the plaintiff's action was time-barred, and therefore dismissed it with costs.

The plaintiff also took the point that the defendant had waived the protection given by section 2(a) of the Ordinance by its conduct. The first of such acts of conduct, he argued, was in relation to the originating motion commenced in 1973. The learned judge found no merit in this argument as the originating motion itself was time-barred. The other conduct alleged on the part of the defendant was in relation to the summons in chambers taken out by the defendant on June 21, 1974 to set aside the plaintiff's action and its subsequent withdrawal. On this question the learned judge agreed with the submission of learned counsel for the defendant that the reason for the withdrawal of the summons in chambers was that at that stage no statement of claim had been filed by the plaintiff so that such withdrawal of the summons in chambers could not be said to be a waiver by the defendant of its contention that the action was time-barred.

In his grounds of judgment the learned judge went on to say that, apart from the action being time-barred, he found that the plaintiff's claim as contained in the statement of claim and the statement of agreed facts was devoid of any merit and wholly misconceived. He then expressed the view that, as the plaintiff's claim was based on the allegation that his conviction was obtained fraudulently, the proper remedy for him was to appeal against his conviction and sentence or, alternatively, if time for appeal had already lapsed, to apply for a revision if there was any miscarriage of justice. The plaintiff had in fact exhausted both those remedies. His claim for a declaration therefore could not be entertained by the court sitting as a civil court in its original jurisdiction. Finally, the learned judge stated it as his opinion that since the statement of claim disclosed no reasonable cause of action and was both frivolous and vexatious, it ought to be dismissed under Order 25 rule 4 of the Rules of the Supreme Court.

The grounds on which the plaintiff relied in support of his appeal to this court were:

(1) that the learned judge erred in holding that his dismissal by the Public Services Commission was in pursuance of a written law or alternatively of a public duty so that he was wrong in holding that the action was barred by section 2(a) of the Public Authorities Protection Ordinance, 1948;

(2) that the learned judge erred in holding that the defendant did not by his conduct waive the protection given by section 2(a) of the said ordinance; and

(3) that the learned judge erred in holding that the plaintiff's statement of claim disclosed no reasonable cause of action and that it was both frivolous and vexatious and ought to be dismissed under Order 25 rule 4 of the Rules of the Supreme Court, 1957.

Taking the second and third grounds of appeal first, it is to be observed that the learned trial judge dismissed the action mainly because he held that it was time-barred, for it was upon that ground and that ground alone that the preliminary objection was taken by the defendant. He dealt with the points raised in these two grounds of appeal merely because they were taken by the plaintiff in answer to the submissions on behalf of the defendant on the preliminary objection.

The main argument by counsel for the appellant in support of the appeal was that if there are allegations of fraud the Public Authorities Protection Ordinance does not apply. For this he relied on the following passage from the judgment of Scrutton L.J. in *G. Scammell & Nephew Ltd.* v. *Hurley & Ors.*[5] at page 427: —

> "To require the application of the Public Authorities Protection Act, the acts must be acts not authorized by any statute or legal justification, but acts intended to be done in pursuance or execution of some statute or legal power. It would appear, therefore, if illegal acts are really done from some motive other than an honest desire to execute the statutory or other legal duty and an honest belief that they are justified by statutory or other legal authority; if they are done from a desire to injure a person or to assist some person or cause, without any honest belief that they are covered by statutory authority, or are necessary in the execution of statutory authority, the Public Authorities Protection Act is no defence, for the acts complained of are not done in intended execution of a statute, but only in pretended execution thereof."

In our judgment there was no substance in this argument because the Public Services Commission dismissed the appellant in pursuance or execution of the powers vested in them by the Public Services (Conduct and Discipline) Regulations, 1956. It is common ground that the appellant was dismissed after he was given an opportunity to be heard as required by the regulations. As regards the particulars of fraud set out in paragraph 27 of the appellant's statement of claim, they all related to the failure on the part of the prosecution to produce certain evidence at his trial in the Sessions Court for criminal breach of trust. As such they should have been raised at the trial or at the appeal from his conviction which the appellant chose not to pursue.

Counsel for the appellant next cited to us the recent case of *Joseph* v. *Government of Sarawak &*

Anor.[6] In our judgment that case had no bearing on the present case. The trial judge in that case found that there was no suggestion that the second defendant acted in exercise of his public duty or authority when he wrote the memorandum concerned. He therefore held that the second defendant had not acted in the exercise of his public duty or authority so as to entitle him to the protection of the Public Authorities Protection Ordinance, 1948.

Coming back now to the second ground of appeal, in our judgment the learned trial judge was quite right in saying that the defendant had not waived his right to have the action dismissed on the ground that it was time-barred either by asking that the originating motion be dismissed for procedural reasons or by applying for the action to be dismissed before the statement of claim was filed.

As regards the third ground of appeal, counsel for the appellant contended that, in dealing with an application to strike out a statement of claim on the ground that it discloses no reasonable cause of action, the court must assume whatever is stated in the statement of claim to be true. In this connection he cited the case of *Mooney & Ors.* v. *Peat, Marwick, Mitchell & Co. & Anor.*[7] The view which we took, as we have already stated above, was that this was a point which was not necessary for the judge to decide in order to dismiss the action, although he was right in saying that there could be no reasonable cause of action so long as there remained on record the appellant's conviction for criminal breach of trust, which was the basis for his dismissal from service.

For the reasons we have stated we dismissed this appeal with costs.

Appeal dismissed.

Solicitors: *Sri Ram, Chan & Chia.*

PUBLIC PROSECUTOR v. DATUK HARUN BIN HAJI IDRIS & ORS.

[O.Cr.J. (Abdoolcader J.) August 10, 1976]

[Kuala Lumpur — Federal Territory Criminal Trials Nos. 31 and 32 of 1976]

Criminal Law and Procedure — Transfer of case to High Court on certificates issued by Public Prosecutor under s. 418A of the Criminal Procedure Code (F.M.S. Cap. 6) — Whether valid — Whether s. 418A of Criminal Procedure Code unconstitutional and void — Inconsistency with Constitution — Criminal Procedure Code (F.M.S. Cap. 6), ss. 417, 418A — Federal Constitution, arts. 8 and 145(3).

In these cases the accused were originally charged in the Sessions Court. The cases were transferred to the High Court on certificates issued by the Public Prosecutor under the provisions of section 418A of the Criminal Procedure Code. Counsel for the accused contended that section 418A of the Criminal Procedure Code violated Article 8(1) of the Federal Constitution and was therefore void and unconstitutional.

Held: (1) Article 8(1) of the Federal Constitution permits reasonable classification founded on intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question. In this case section 418A of the Criminal Procedure Code conferred discretionary power on the authority without laying down any policy or disclosing any tangible or intelligible purpose and thus conferred unguided and arbitrary powers enabling the authority to discriminate;

(2) while the Public Prosecutor has power under Article 145(3) of the Federal Constitution, exercisable to his discretion, to institute conduct or discontinue any proceedings the Public Prosecutor cannot in the exercise of his discretionary powers discriminate at will and infringe the provisions of Article 8(1) as judicially determined in the matter of clarification, differentia and nexus;

(3) in this case the accused have been prejudiced, as if they are tried in the High Court, the High Court has greater powers of punishment than the Sessions Court;

(4) section 418A of the Criminal Procedure Code as it is worded and as it stands is therefore unconstitutional and void by virtue of the provisions of Article 8(1) of the Federal Constitution and equally so the certificates issued by the Public Prosecutor thereunder for the transfer of the cases to the High Court. The transfer effected thereby is accordingly of no effect;

(5) it is open to the Public Prosecutor to apply for the transfer of the cases to the High Court under section 417 of the Criminal Procedure Code and such application will then be considered on its merits.

Cases referred to:—

(1) *State of Madhya Pradesh* v. *G.C. Mandawar* A.I.R. 1954 S.C. 493.

(2) *Raja Surapayal Singh* v. *Uttar Pradesh Government* A.I.R. 1951 All 674 at p. 690.

(3) *Lindsley* v. *National Carbonic Gas Co. Ltd.* (1911) 220 U.S. 61.

(4) *State of Bombay* v. *F.N. Balsara* A.I.R. 1951 S.C. 318, 326.

(5) *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar* A.I.R. 1958 S.C. 538, 547.

(6) *Jyoti Pershad* v. *Administrator of the Union Territory of Delhi* A.I.R. 1961 S.C. 1602.

(7) *Kedar Nath Bajoria* v. *State of West Bengal* A.I.R. 1953 S.C. 404, 407.

(8) *Chiranjit Lal Chowdhuri* v. *Union of India* A.I.R. 1950 S.C. 41.

(9) *State of West Bengal* v. *Anwar Ali Sarkar* A.I.R. 1952 S.C. 75, 79-81, 85, 89-90, 92.

(10) *Kathi Raning Rawat* v. *State of Saurashtra* A.I.R. 1952 S.C. 123.

(11) *Shree Meenakshi Mills Ltd.* v. *A.V.V. Sastri* A.I.R. 1954 S.C. 13.

(12) *Bidi Supply Company* v. *Union of India* A.I.R. 1956 S.C. 479.

(13) *Mohamed Sidin* v. *Public Prosecutor* [1967] 1 M.L.J. 106.

(14) *Srinivasa Aiyar* v. *Saraswathi Ammal* A.I.R. 1952 Mad. 193, 195.

(15) *Anjali* v. *State of West Bengal* A.I.R. 1952 Cal. 825, 829.

(16) *Pillai* v. *Mundayanake* [1953] A.C. 514.

(17) *In re Bhupalli Malliah* A.I.R. 1959 And. Pra. 477.

(18) *Pride of Derby* v. *British Celanese Ltd.* [1953] 1 Ch. 149, 167.

(19) *Long bin Samat & Ors.* v. *Public Prosecutor* [1974] 2 M.L.J. 152.

(20) *Matajog Dobey* v. *H.C. Bhari* A.I.R. 1956 S.C. 44.

(21) *Indira Nehru Gandhi* v. *Raj Narain* A.I.R. 1975 S.C. 2292.

(22) *Moti Ram* v. *Union of India* A.I.R. 1966 H.P. 25, 31, 32.

(23) *James* v. *Commonwealth of Australia* [1936] A.C. 578, 614.

(24) *Devi Das Gopal Krishnan* v. *State of Punjab* A.I.R. 1967 S.C. 1895, 1901.

(25) *Somnath Misra* v. *Union of India* A.I.R. 1969 Orissa 37, 42.

(26) *Public Prosecutor* v. *Fan Yew Teng* [1973] 2 M.L.J. 1, 3.